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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

SUSAN L. LASWELL, as Trustee, etc.,
et. al.,

Plaintiffs and Respondents,

v.

MARY ELLEN LASWELL,

Defendant and Appellant.

C068710

(Super. Ct. No. PR39632)

In this trust proceeding, the trustee (plaintiff Susan L. Laswell) and a beneficiary (defendant Mary Ellen Laswell) entered into a settlement orally before the court, agreeing (among other things) that each party was "waiv[ing] all known and unknown claims against each other, the Trustee in her trustee capacity, and the Trust." When Mary Ellen¹ refused to sign a proposed judgment prepared by Susan's attorney that contained additional waiver language, Susan moved for entry of

¹ To avoid confusion, we refer to the Laswells by their first names.

judgment pursuant to Code of Civil Procedure section 664.6 (section 664.6).² The trial court entered the judgment Susan proposed with the additional waiver language.

On Mary Ellen's appeal from that judgment, we conclude the trial court erred because on motion under section 664.6 the court cannot enter a judgment containing terms other than those on which the parties agreed. Here, the terms of the waiver to which the parties stipulated on the record were simple and straightforward, and Mary Ellen had a right to have *that* waiver included in any resulting judgment. Accordingly, we will reverse and remand with directions to the trial court to enter a judgment that contains the waiver language to which the parties agreed.

FACTUAL AND PROCEDURAL BACKGROUND

In 1991, Virginia Laswell executed a living trust. The trust instrument named her daughter Susan as the successor trustee upon Virginia's death or incapacity and provided for the equal distribution of the trust assets to all three of Virginia's daughters -- Lorraine Buchla, Mary Ellen, and Susan -- upon Virginia's death.

² "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." (Code Civ. Proc., § 664.6.)

According to the petition that commenced this proceeding, Susan began serving as trustee in early 2009 due to Virginia's incapacity. Virginia died sometime thereafter.

In July 2010, acting in her capacity as trustee, Susan filed a petition for instructions under Probate Code section 17200, seeking relief against Mary Ellen relating to the trust. Mary Ellen opposed the petition. Eventually, the matter was set for trial in March 2011. On the day of trial, the parties settled. Susan's attorney recited the terms of the settlement on the record. On the issue of the waiver of claims, Susan's attorney stated as follows: "Each of the parties agrees to waive all known and unknown claims against each other, the Trustee in her trustee capacity, and the Trust." When Mary Ellen's attorney pointed out there were to be "[n]o surcharges," Susan's attorney responded, "Yes, thank you. Mr. Dreifort points out that there will be a waiver of all of the surcharge claims by the Trust against Mary Ellen. And there will be a reciprocal waiver of any potential surcharge claims by Mary Ellen against her sisters Lorraine and Susan."

The day after the settlement, Susan's attorney sent a proposed "Judgment by Stipulation" to Mary Ellen's attorney for Mary Ellen to sign. The proposed judgment included the following provision relating to the waiver of claims:

"9. This Stipulated Judgment includes a Waiver and Release of all claims, both known and unknown, for the consideration of this Judgment and the payments provided herein, each of the VIRGINIA L. LASWELL 1991 TRUST DATED 10/18/91, SUSAN, LORRAINE,

and MARY ELLEN, on their behalf and on behalf [of] all heirs, successors and assigns, do hereby waive and give up any and all claims, causes of action or right to commence proceedings, of any nature or kind, against each other individually or against the Trust or the Trustee of the Trust related to or arising directly or indirectly from any actions related to the administration of the Trust, the care of VIRGINIA LASWELL, the affairs of VIRGINIA LASWELL, or of any of SUSAN, LORRAINE or MARY ELLEN, in regard to properties, expenses, costs or income receivable by VIRGINIA LASWELL or the VIRGINIA L. LASWELL 1991 TRUST. This Waiver includes both known and unknown claims, and each of SUSAN, LORRAINE, MARY ELLEN and the Trust and Trustee, on behalf of the Trust, do hereby waive the benefits of section 1542 of the Civil Code of the State of California" After setting forth the language of that statute, the judgment recited, "Each of the parties does waive, give up claims which they may not presently be aware of."

Mary Ellen refused to sign the proposed judgment unless certain changes were made, including changes to the waiver provision. Susan's attorney refused to change the waiver provision. Mary Ellen's attorney reviewed the transcript of the settlement on the record, noted that the proposed judgment contained "a much broader waiver," and expressed his view that the court would not "approve a waiver broader than what was stated in open court."

The reason Mary Ellen objected to the additional waiver language in the proposed judgment was that she contemplated

suing her mother's care givers, and she was "concerned that with the broad all inclusive language utilized in paragraph nine of [the] proposed stipulated judgment, somehow, she would be precluded from bringing her lawsuit." Susan, on the other hand, was concerned that any suit against Virginia's care givers would result in a claim against the trust, "[b]ecause generally, in admitting patients to these care facilities, there is a duty on the part of the admittee's financial estate to indemnify and pay defense costs arising from the care provided to Virginia." Accordingly, Susan refused to change the waiver language in the proposed judgment.

When Mary Ellen continued to refuse to sign the proposed judgment, Susan filed a motion to enter the judgment pursuant to section 664.6. Mary Ellen opposed the motion "to the extent that [the judgment entered] would include a broader waiver of claims than contemplated by the stipulation recited by the parties in open court." Mary Ellen proposed a waiver that echoed the terms recited on the record, with the addition of a specific mention of Civil Code section 1542.

Without explanation, the trial court entered the judgment proposed by Susan, which included the additional waiver language. Mary Ellen timely appealed from that judgment.³

³ Although Mary Ellen's opening brief does not discuss the appealability of the judgment in this case, we conclude it is appealable under Probate Code section 1304, subdivision (a), which provides that any final order on a petition concerning the internal affairs of a trust pursuant to Probate Code section 17200 is appealable, with the exception of an order

DISCUSSION

On appeal, Mary Ellen contends there is no substantial evidence to support the trial court's implicit finding that the parties agreed to the broad waiver language contained in the proposed judgment Susan's attorney prepared. She contends the judgment should be vacated, and the matter sent back for further proceedings, because the waiver paragraph the court approved does not reflect the mutual agreement of the parties.

We agree. The trial court's authority on a motion under section 664.6 is limited to "enter[ing] judgment *pursuant to the terms of the settlement.*" (§ 664.6, italics added.) "Although a judge hearing a section 664.6 motion may receive evidence, determine disputed facts, and enter the terms of a settlement agreement as a judgment [citations], nothing in section 664.6 authorizes a judge to create the material terms of a settlement, as opposed to deciding what terms *the parties themselves* have previously agreed upon." (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810.)

"Often, in cases where an oral settlement is placed on the record in the trial court, a written agreement will follow. If difficulties or unresolvable conflicts arise in drafting the written agreement, the oral settlement remains binding and enforceable under section 664.6." (*Elyaoudayan v. Hoffman* (2003) 104 Cal.App.4th 1421, 1431.)

"[c]ompelling the trustee to submit an account or report acts as trustee" or "[a]ccepting the resignation of the trustee."

Here, the terms the parties agreed upon with respect to the waiver of claims are set forth in the reporter's transcript of the hearing at which Susan's attorney read the terms of the settlement into the record, as follows: "Each of the parties agrees to waive all known and unknown claims against each other, the Trustee in her trustee capacity, and the Trust."⁴ While Mary Ellen could have chosen to agree to the additional language Susan's attorney included in the proposed judgment, *she was not bound to do so*. Instead, she was entitled to insist that any judgment entered on the parties' settlement was consistent with the terms of that settlement, as recited into the record. Thus, over Mary Ellen's objection, it was error for the trial court to enter a judgment that contained waiver language broader than that to which the parties specifically agreed orally before the court.

Susan contends that "[f]or . . . Mary Ellen . . . to reserve the rights to continue to enmesh the . . . Trust and her own sisters in litigation relating to their motion, a motion or request to the Trial Court to set aside the Stipulated Judgment and settlement agreement on the basis of unilateral or mutual mistake and to request a full trial was essential." This argument misses the point entirely. Mary Ellen's argument is that the judgment the trial court entered should never have

⁴ As previously noted, there was also additional language specifically waiving any "surcharge," but that additional language is not at issue on this appeal.

included waiver language beyond that to which the parties actually agreed orally before the court. That argument is correct. Mistake is simply not an issue here.

Susan also argues at length about a restraining order that was allegedly in place during Virginia's lifetime that contained provisions for how Mary Ellen was to object regarding any care provided to Virginia.⁵ Again, Susan's argument misses the point. The sole question here is this: Was Mary Ellen entitled to insist that any judgment entered on the parties' settlement pursuant to section 664.6 contain only the waiver language to which the parties agreed orally before the court? (As we have concluded, the answer to that question is "yes.") Because the restraining order to which Susan refers has no bearing on that question, her argument based on the restraining order is irrelevant.

DISPOSITION

The judgment is reversed, and the case is remanded to the trial court with instructions to enter a new judgment consistent with this opinion -- that is, a judgment containing the waiver language and nothing else to which the parties agreed orally before the court. Mary Ellen shall recover her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

⁵ Because we find the restraining order irrelevant, we deny Susan's request that we take judicial notice of it.

ROBIE, J.

We concur:

BLEASE, Acting P. J.

HULL, J.